Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05–19 OF 2007(A) AND 05–20 OF 2007(A)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), NIK HASHIM AND HASHIM YUSOFF FCJJ
16 FEBRUARY 2009

Criminal Procedure — Appeal — Conviction, against — Appellants charged with common intention to commit murder — Whether trial judge and Court of Appeal erred in admitting discovery statements given by appellants during interrogation — Whether circumstantial evidence adduced by prosecution indicated guilt for offences of murder — Whether circumstantial evidence relied upon by prosecution failed to establish elements of 34 of the Penal Code — Penal Code ss 34 & 302

Evidence — Information leading to fact discovered — Admissibility — Statements leading to discovery of body of fourth victim and missing jewellery — Whether admissible under s 27 of the Evidence Act 1950 without having to prove voluntariness — Whether should have been rejected by trial judge — Evidence Act 1950 s 27

The two appellants were charged for causing the death of four persons. The bodies of the first three victims, the wife of the owner of a jewellery shop ('victim 2'), his son ('victim 1') and their maid ('victim 3'), were found brutally killed in different locations of their house at No 82, Laluan Tasek Timur 16, Ipoh while the body of the fourth victim, the watchman of the jewellery shop ('victim 4'), was found at 292.4km of the North-South Highway. The bodies of victims 1, 3 and 4 were tied up with the same red and yellow fibered rope. A post mortem on all four victims revealed that all the victims had died of multiple stab wounds caused by a sharp object similar to the two blood stained blades found in the house where the bodies of the first three victims were found. Police investigation established that the keys to the jewellery shop ('the shop') which were normally kept by victim 2 were missing, that there was no forced entry into the shop but that the padlocks inside the shop still had the keys attached to them and that all the jewellery in the shop was missing. Based on their investigations the police arrested the two appellants. In the course of being questioned by the police the first appellant gave certain information that led to the discovery of the body of

victim 4 and the second appellant also gave certain information that led to the discovery of the missing jewellery. The trial judge did not admit any of the cautioned statements of the appellants at the trial. The prosecution led evidence to establish that the theft and the murders were an integral part of one and the same transaction and that based on several cogent pieces of circumstantial evidence it was established beyond reasonable doubt that the appellants had participated in the commission of the murders in the context of s 302 of the Penal Code ('Code') read with s 34 of the same. At the end of the prosecution's case the trial judge called for the appellants to enter their defence. At this point the first appellant opted to remain silent while the second appellant gave evidence on oath wherein he denied committing the offences for which he was charged and alleged that he had only entered the shop when attracted by the sound of the burglar alarm coming from the shop. At the end of the whole case the trial judge being satisfied that the prosecution had proved its case beyond reasonable doubt and that the appellants had failed to cast any reasonable doubt convicted the appellants and sentenced them to death for the offence of murder. The appellants' appeal to the Court of Appeal focused on the issues of admission of the discovery statements by the trial judge and his approach to the circumstantial evidence adduced by the prosecution. The Court of Appeal agreed with the findings of the trial judge and dismissed the appeal and hence this appeal. This appeal by the appellants was premised on three main grounds, namely, whether the trial judge and the Court of Appeal erred in admitting the discovery statements purportedly given by the appellants in the course of police interrogation; whether the trial judge and the Court of Appeal failed to appreciate that the circumstantial evidence adduced by the prosecution did not indicate their guilt for the offences of murder; whether the trial judge and the Court of Appeal failed to consider that the circumstantial evidence relied upon by the prosecution failed to establish the elements of 34 of the Code.

Held, dismissing the appeals and affirming the convictions and sentences of the High Court:

(1) The admission or rejection of discovery statements is not premised on voluntariness, which is the requirement for the admission of cautioned statements. The court has the discretion to exclude a discovery statement on the grounds that its prejudicial effect outweighs its probative value. The statement of the first appellant to the police led to the discovery of the body of victim 4 and in exercising his discretion to admit that discovery statement the trial judge was of the view that the probative value of the discovery statement far outweighed its prejudicial effect. The Court of Appeal was also in complete agreement with this conclusion. There was no compelling reason to reverse the trial judge's

finding now as it was clear that a proper appreciation of the evidence adduced was done and the right principles of law considered and applied (see paras 31–34).

(2) Similarly the statement by the second appellant led to the discovery of the missing jewellery and although recorded a day and a half after the cautioned statement this should not preclude the trial judge from exercising his discretion. Thus having considered the reasons given by the trial judge for admitting the discovery statement of the second appellant there was no basis to say that the trial judge committed an error in admitting the discovery statement of the second appellant (see paras 44–45).

(3) It is settled law that evidence adduced in a trial within a trial cannot be used against an accused in the main trial. Thus there was no merit in the first appellant's contention that the trial judge should have given reasons for refusing to admit the cautioned statement made by him. Since the trial judge had declined to admit the first appellant's cautioned statement he could not allude to evidence adduced during the trial within a trial as that would be tantamount to requiring him to consider evidence favourable to the first appellant and thus not a fair trial (see paras 37–39).

(4) It is trite law that an appellate court will not disturb the findings of fact of a trial court based on inferences from primary facts if such inferences, having regard to the evidence and circumstances, are reasonable. In the present case the theft and murder were taken as one transaction and as such the cumulative effect of each of the circumstantial evidence adduced was considered. There was no error in such an approach (see para 50).

(5) The first appellant elected to remain silent, which he was entitled to do in law. At the same time the trial judge was right in calling for the appellants to enter their defence as there was more than sufficient circumstantial evidence and reasonable inferences adduced by the prosecution to justify his decision. Thus, by opting to remain silent after being called upon to enter his defence the trial judge had no option but to convict the first appellant (see paras 54–55).

(6) It is settled law that s 34 of the Code is a rule of evidence and does not create a substantive offence. The existence of a common intention to commit a crime under s 34 of the Code is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. In the instant case the trial judge concluded that such a common intention had been established relying on the inferences garnered from the circumstances proved. Bearing in mind that the acts committed in this case should be taken as one transaction and not

separate, this was a classic case of where the trial judge had carefully examined each piece of circumstantial evidence adduced, drawing the appropriate inferences and applying the principles of s 34 of the Code before concluding that the appellants had acted with the common intention in executing the killings. Thus there was no error in the conclusion of the trial judge that warrants any intervention (see paras 60–66).

[Bahasa Malaysia summary

Kedua-dua perayu dipertuduhkan dengan kesalahan mengakibatkan kematian empat orang. Mayat tiga mangsa; isteri pemilik kedai emas ('mangsa 2'), anaknya ('mangsa 1') dan orang gaji mereka ('mangsa 3'), ditemui dibunuh dengan kejam di lokasi yang berbeza dalam rumah mereka di No 82, Laluan Tasek Timur 16, Ipoh, sementara mayat mangsa keempat, pengawal keselamatan kedai emas tersebut ('mangsa 4') ditemui di kilometer 292.4 Lebuhraya Utara-Selatan. Mayat mangsa 1, 3 dan 4 diikat dengan tali fiber merah dan kuning yang sama. Daripada bedah siasat terhadap keempat-empat mangsa menunjukkan kesemua mangsa mati akibat daripada tikaman bertubi-tubi oleh suatu objek tajam, sama dengan kesan darah yang dijumpai pada dua bilah pisau dalam rumah tersebut di mana mayat ketiga-tiga mangsa ditemui. Daripada siasatan polis mendapati bahawa kunci kedai emas tersebut ('kedai tersebut') yang biasanya disimpan oleh mangsa 2, telah hilang, tidak terdapat pecah masuk ke dalam kedai tersebut tetapi mangga kunci yang terletak di dalam kedai tersebut masih terdapat anak kunci padanya dan kesemua barang kemas dalam kedai tersebut hilang. Berdasarkan siasatan mereka, polis telah menangkap kedua-dua perayu. Ketika disoalsiasat oleh pihak polis, perayu pertama memberikan beberapa maklumat yang membantu penemuan mayat mangsa 4 dan perayu kedua juga memberi beberapa maklumat yang membantu penemuan barang kemas yang hilang itu. Hakim perbicaraan tidak menerima satu pun pernyataan beramaran perayu-perayu semasa perbicaraan. Pihak pendakwaan mengemukakan keterangan yang membuktikan bahawa kecurian dan pembunuhan tersebut merupakan keseluruhan bahagian dalam satu transaksi yang sama dan berdasarkan beberapa keterangan ikut keadaan yang nyata dan jelas, adalah dibuktikan melampaui keraguan yang munasabah bahawa perayu-perayu terlibat dalam pembunuhan tersebut, dalam konteks s 302 Kanun Keseksaan ('Kanun tersebut') dibaca bersama s 34. Pada akhir kes pihak pendakwaan hakim perbicaraan mengarahkan perayu-perayu memasukkan pembelaan mereka. Pada ketika ini, perayu pertama memilih untuk mendiamkan diri manakala perayu kedua memberi keterangan bersumpah menafikan penglibatannya melakukan jenayah yang dipertuduhkan tersebut dan mendakwa bahawa dia hanya masuk ke kedai tersebut apabila mendengar bunyi penggera kecurian dari kedai tersebut.

A Pada akhir keseluruhan kes tersebut hakim perbicaraan berpuas hati bahawa pihak pendakwaan berjaya membuktikan kes mereka melampaui keraguan yang munasabah dan perayu-perayu gagal menimbulkan keraguan munasabah, menyabitkan perayu-perayu dan menghukum mereka dengan hukuman mati atas kesalahan membunuh. Rayuan perayu-perayu ke
B Mahkamah Rayuan tertumpu pada isu penerimaan pernyataan-pernyataan penzahiran oleh hakim perbicaraan dan juga pendekatan beliau terhadap keterangan ikut keadaan yang dikemukakan oleh pihak pendakwaan. Mahkamah Rayuan bersetuju dengan penemuan hakim perbicaraan tersebut dan menolak rayuan mereka. Sesudah itu, perayu-perayu merayu terhadap
C keputusan rayuan. Rayuan perayu-perayu bersandarkan atas tiga alasan, iaitu, sama ada hakim perbicaraan dan Mahkamah Rayuan salah apabila menerima masuk pernyataan-pernyataan penzahiran yang kononnya diberikan oleh perayu-perayu ketika disoal siasat; sama ada hakim perbicaraan dan
D Mahkamah Rayuan gagal meneliti keterangan keadaan yang dikemukakan oleh pihak pendakwaan yang mana tidak menunjukkan bahawa mereka bersalah melakukan pembunuhan tersebut; sama ada hakim perbicaraan dan Mahkamah Rayuan gagal mempertimbangkan bahawa keterangan ikut keadaan yang diguna pakai oleh pihak pendakwaan sebenarnya gagal
E membuktikan elemen-elemen dalam s 34 Kanun tersebut.

Diputuskan, menolak rayuan-rayuan dan mengesahkan sabitan dan hukuman Mahkamah Tinggi:

F (1) Penerimaan atau penolakan pernyataan-pernyataan penzahiran tidak perlu bersandarkan kepada kerelaan, yang mana merupakan keperluan bagi suatu pernyataan beramaran diterima. Mahkamah mempunyai budi bicara untuk tidak menyertakan pernyataan penzahiran
G berdasarkan kesan prejudisnya yang mengatasi nilai probatif. Pernyataan perayu pertama kepada pihak polis membantu kepada penemuan mayat mangsa 4 dan dalam mengguna pakai budi bicaranya dengan memasukkan pernyataan penzahiran tersebut sebagai bahan bukti, hakim perbicaraan berpendapat bahawa nilai probatif pernyataan
H tersebut jauh mengatasi kesan prejudis. Mahkamah Rayuan juga bersetuju sepenuhnya dengan kesimpulan ini. Tiada sebab mengapa perlu mengubah keputusan hakim perbicaraan kerana adalah jelas bahawa penelitian keterangan yang dikemukakan dilakukan dengan tepat dan prinsip-prinsip perundangan yang jitu diguna pakai dan
I dipertimbangkan (lihat perenggan 31–34).

(2) Sama juga dengan pernyataan penzahiran perayu kedua yang membantu dalam penemuan barangan kemas yang hilang itu. Walaupun direkodkan sehari setengah selepas pernyataan beramaran dibuat, ini tidak seharusnya menghalang hakim perbicaraan

melaksanakan budi bicaranya. Oleh itu, setelah menghalusi alasan-alasan yang diberikan oleh hakim perbicaraan untuk menerima pernyataan penzahiran perayu kedua, tiada sebab untuk menyatakan bahawa hakim perbicaraan telah terkhilaf di dalam menerima pernyataan penzahiran perayu kedua tersebut (lihat perenggan 44–45).

(3) Telah menjadi hukum perundangan bahawa keterangan yang dikemukakan dalam perbicaraan dalam perbicaraan tidak boleh diguna pakai dalam perbicaraan utama terhadap tertuduh. Oleh itu, dakwaan perayu pertama bahawa hakim perbicaraan seharusnya memberi alasan mengapa dia menolak pernyataan beramarannya sebagai bahan bukti adalah tidak bermerit. Memandangkan hakim perbicaraan menolak pernyataan beramarannya sebagai bahan bukti, dia tidak boleh merujuk kepada keterangan yang dikemukakan semasa perbicaraan dalam perbicaraan kerana itu akan membuatkan hakim terpaksa menimbang keterangan yang berpihak kepada perayu pertama dan tentunya akan membawa kepada ketidakadilan (lihat perenggan 37–39).

(4) Adalah undang-undang yang nyata bahawa mahkamah rayuan tidak akan mencampuri penemuan fakta oleh hakim perbicaraan berdasarkan kesimpulan-kesimpulan daripada fakta-fakta pokok, jika inferens tersebut, menurut keterangan dan keadaan, adalah wajar. Dalam kes ini, kecurian dan pembunuhan tersebut dikira sebagai satu transaksi dan oleh itu kesan kumulatif setiap keterangan keadaan yang dikemukakan telah dipertimbangkan. Tiada kesilapan dalam pendekatan tersebut (lihat perenggan 50).

(5) Perayu pertama memilih untuk berdiam diri yang merupakan haknya di sisi undang-undang. Pada masa yang sama, hakim perbicaraan juga bertindak dengan betul apabila mengarahkan perayu-perayu membela diri mereka oleh sebab adanya keterangan ikut keadaan dan kesimpulan-kesimpulan wajar yang lebih daripada mencukupi dikemukakan oleh pihak pendakwaan untuk menjustifikasikan keputusan hakim tersebut. Oleh itu, dengan memilih untuk mendiamkan diri setelah diarahkan untuk membela dirinya, hakim perbicaraan tiada pilihan lain selain daripada mensabitkan perayu pertama (lihat perenggan 54–55).

(6) Adalah undang-undang yang tetap bahawa s 34 Kanun tersebut merupakan peraturan undang-undang keterangan dan tidak membentuk kesalahan substantif. Kewujudan niat bersama untuk melakukan kesalahan jenayah di bawah s 34 Kanun tersebut merupakan persoalan fakta bagi setiap kes yang perlu dibuktikan, biasanya menerusi kesimpulan yang dibuat daripada keadaan-keadaan kes. Dalam kes ini, hakim perbicaraan menyimpulkan bahawa wujudnya niat bersama menerusi kesimpulan-kesimpulan yang dikumpulkan daripada keadaan-keadaan yang telah disahkan. Memandangkan

kesalahan-kesalahan yang dilakukan dalam kes ini harus dilihat sebagai satu transaksi dan bukannya secara berasingan, ini merupakan kes klasik di mana hakim perbicaraan telah meneliti satu persatu keterangan ikut keadaan yang dikemukakan, menyimpulkan huraian-huraian yang bersesuaian dan mengguna pakai prinsip-prinsip s 34 Kanun tersebut sebelum memutuskan bahawa perayu-perayu bertindak dengan mempunyai niat bersama apabila melakukan pembunuhan tersebut. Maka, tiada kesilapan dalam keputusan hakim perbicaraan yang mewajarkan campur tangan (lihat perenggan 60–66).]

Notes

For cases on admissibility, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1799–1804.

For cases on conviction, against, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 296–341.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Broadhurst v The Queen [1964] 2 WLR 44, PC (refd)
Charles Osenton & Co v Johnston [1942] AC 130, HL (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507; [1999] 1 CLJ 829, FC (refd)
Jones v Dunkel (1958–59) 101 CLR 298 (refd)
Kesavan v PP [2003] 2 MLJ 209; [2003] 1 CLJ 846, CA (refd)
Krishna Rao Gurumurthi & Anor v PP & another appeal [2007] 4 CLJ 643, CA (refd)
Loh Shak Mow v PP Wong Hoi Ping, Alan v PP [1987] 1 MLJ 362; [1986] 1 SLR 358, HC (refd)
Malayan Banking Bhd v Association of Bank Officers Peninsula Malaysia [1988] 3 MLJ 204, SC (refd)
Nathan v PP [1972] 2 MLJ 101, CA (refd)
PP v Kalaiselvan [2001] 2 MLJ 157, HC (refd)
PP v Krishna Rao a/l Gurumurthi & Ors [2000] 1 MLJ 274; [2000] 1 CLJ 446, HC (refd)
PP v Mohd Radzi Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy and Others [1946] AC 508, PC (refd)

Legislation referred to

Criminal Procedure Code s 113
Evidence Act 1950 s 114
Penal Code ss 34, 302

Appeal from: Criminal Appeal No A-05–52 of 1999 (Court of Appeal, Putrajaya)

Ahmad Nizam bin Mohamed (Ridhuwan bin Ismail with him) (Ahmad Nizam & Co) for the first appellant.
Malik Imtiaz Sarwar (M Lavendran, Neoh Hor Kee with him) (Ngeow & Tan) for the second appellant.
Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Richard Malanjum CJ (Sabah and Sarawak):

INTRODUCTION AND BACKGROUND FACTS

[1] Before us are two appeals taken together. For convenience in this judgment we will refer to the respective appellants as the first appellant for Criminal Appeal No 05–19 of 2007 (first accused in the trial below) and the second appellant for Criminal Appeal No 05–20 of 2007 (second accused in the trial below). Both the appellants are appealing against the decision of the Court of Appeal ('COA') dismissing their appeals and affirming the judgment of the learned trial judge who convicted them on four charges of murder and sentenced them to death accordingly.

[2] When the hearing began before us learned counsel for the second appellant requested that he submitted first in view of the issues he intended to raise. Learned counsel for the first appellant agreed. Hence we acceded to the request. In fact when his turn to submit came up learned counsel for the first appellant substantially adopted the submission of learned counsel for the second appellant.

[3] Initially these two appellants were charged together with Kumaresan ('the third accused'). However at the end of the prosecution case the third accused was discharged and acquitted without his defence being called. There was no appeal against his acquittal. All three were charged for causing the death of four persons namely, Sathian a/l Nalliah ('victim 1'), Virama a/p Subramaniam ('victim 2'), Juriyah ('victim 3') and Balakrishnan a/l Maniam ('victim 4'). The bodies of the first three victims were found dead at house No 82, Laluan Tasek Timur 16, Taman Seri Dermawan, Bercham, Ipoh, in Kinta District, Perak Darul Ridzuan. The original three charges against them alleged that the time of commission of the offence was between 5.15pm and 8pm on 12 March 1998 at the place where the bodies were found. At the end of the prosecution case the learned trial judge amended the charge to exclude the third accused and the alleged time to be between 6.30pm on 12 March 1998 and 6.45am on 13 March 1998 but s 34 of the Penal Code was retained.

A **[4]** The body of victim 4 was found at 292.4km of the North-South Highway on the night of 13 March 1998. However, in the original charge the offence was alleged to have been committed on 12 March 1998 between 9pm and 10pm at Malika Jewellers, No 27, Jalan Lahat, Ipoh, in the Kinta District, Perak Darul Ridzuan. The learned trial judge also amended the B charge with the alleged time of commission of the offence to be between 6.30pm on 12 March 1998 and 11.45pm on 13 March 1998 at an unknown place. Similarly s 34 of the Penal Code was maintained.

C **[5]** The background facts of these appeals have been meticulously narrated by both the lower courts (see *Krishna Rao Gurumurthi & Anor v Public Prosecutor & another appeal* [2007] 4 CLJ 643 (CA) and *Public Prosecutor v Krishna Rao a/l Gurumurthi & Ors* [2000] 1 MLJ 274; [2000] 1 CLJ 446 (HC). As such in this judgment we only need to highlight the salient facts.

D

[6] Briefly, the finding of the bodies of the first three victims at No 82, Laluan Tasek Timur 16, Taman Seri Dermawan, Bercham, Ipoh was the result of the initial investigation by the police after Harminderjit Singh (PW33) lodged a police report of what he saw at around 1am on 13 March 1998.

E

[7] PW33 was on his way for supper when he was attracted by the sound of the burglar alarm that went off in the jewellery shop known as Kedai Emas Chitra. He also saw a Proton Iswara with registration No PCV 7749 parked outside the shop with a person inside seated on the driver's seat. Subsequently F two other persons came out of the jewellery shop. The parked car then left the vicinity with PW33 following but only to lose it along Jalan Gopeng.

[8] The bodies found were that of victim 2, the wife of Nalliah Periasamy G (PW26) who was the owner of the jewellery shop, his son victim 1 and the maid, victim 3. All had been brutally killed with victim 1 and victim 3 tied up with red and yellow fibred rope. PW26 was away in India at that time attending to his other son's graduation. On the morning of 12 March 1998 victim 2 and victim 3 came to the shop and were seen returning home in the H evening on the same day.

[9] In the house the police did not find the keys to the shop which were normally kept by victim 2. However two blood stained blades (exhs P12A and P24A) which came from a pair of scissors were found. One of them had I its end broken.

[10] Investigation by the police in the shop revealed that there was no forced entry. But the padlocks found inside the shop still had the keys attached to them. All the jewellery in the shop were missing.

[11] By midday on 13 March 1998 the police managed to arrest two suspects, namely the second appellant and the third accused at No 14A, Lahat Lane, Ipoh. Subsequently on the same day the first appellant was arrested at Room 502, Hotel Ritz Kowloon, Ipoh.

[12] Two vehicles one of which was seen by PW33 parked outside the shop the night before were also seized by the police on the same day.

[13] While being questioned by the police after his arrest the first appellant gave certain information and led the police to the discovery of the body of victim 4, the watchman of the jewellery shop. His body was also tied with red and yellow fibred rope.

[14] Cautioned statements from all the arrested persons were also recorded by the police. However the trial judge did not admit any of them as evidence.

[15] About a day and the half after he had given his cautioned statement to the police the second appellant gave certain information and led the police to the area known as Baling Bom as it was used by the Police Field Force Ulu Kinta to dispose of hand grenades. There the police discovered items of the jewellery that had been removed from the jewellery shop. Incidentally the second appellant was previously a member of the Police Field Force.

[16] PW2 (Dr Khairul Azman), a forensic pathologist attached to the Ipoh Hospital conducted the post-mortem on all four victims. His findings revealed that all four victims had died of multiple stab wounds caused by a sharp object similar to exhs P12A and P24A. PW2 also confirmed that similar red and yellow fibred rope (exh P31A) were used to tie up victims 1, 3 and 4.

[17] At the end of the prosecution case the learned trial judge called for the defence of the first and second appellants but acquitted the third accused.

[18] When his defence was called the first appellant opted to remain silent while the second appellant gave evidence on oath.

[19] In his defence before the learned trial judge the second appellant denied committing the offences for which he was charged. He said that he only entered the shop with the third accused when they were attracted by the sound of the burglar alarm coming from there.

[20] Giving at least seven reasons, inter alia, the demeanour of the second appellant and his failure to deny involvement at the earliest opportunity

A available, the learned trial judge disbelieved the version of the second appellant. Accordingly he found the second appellant had failed to cast any reasonable doubt against the case established by the prosecution.

B **[21]** At the end of the whole case the learned trial judge was satisfied that the prosecution had proved its case beyond reasonable doubt. The appellants had failed to cast any reasonable doubt. Hence the appellants were convicted for the offence charged and sentenced to death, a mandatory punishment for the offence of murder.

C **[22]** On appeal to the COA the focus was on the issues of admission of the discovery statements by the learned trial judge and his approach to the circumstantial evidence adduced by the prosecution.

D **[23]** In a unanimous judgment the COA agreed with the findings of the learned trial judge. The court held that:

(a) the appellants did in fact give the discovery statements to the police;

(b) there was no oppression exerted by the police on the appellants to
E compel them in giving their respective discovery statements;

(c) the discovery statements of the appellants were correctly admitted by the learned trial judge;

(d) the conviction of the first appellant following his silence when called to
F enter upon his defence was correct; and

(e) the circumstantial evidence adduced irresistibly led to the guilt of the appellants.

G **[24]** Before us learned counsel for the appellants substantially repeated the points submitted before the Court of Appeal. They were premised on three main arguments, namely:

(a) the admission of the discovery statements;

H (b) the circumstantial evidence adduced and inferences made thereon; and

(c) the presumptions relied upon by the prosecution.

[25] The other ancillary issues raised were:

I (a) the prima facie test applied by the trial judge and the silence of the first appellant;

(b) s 34 of the Penal Code and the burden of proof; and

(c) the absence of identification on the appellants.

[26] We will address these issues in sequence as we find appropriate. But we take note that in these appeals there had been concurrent findings of fact both by the trial High Court and the Court of Appeal. Thus, as the final appellate court we should be slow in interfering with such findings unless there are blatant errors committed in coming to such findings (see *Loh Shak Mow v Public Prosecutor; Wong Hoi Ping, Alan v Public Prosecutor* [1987] 1 MLJ 362; *Wong Hoi Ping, Alan v Public Prosecutor* [1987] 1 MLJ 362 (also [1986] SLR 358) (HC); *Broadhurst v The Queen* [1964] 2 WLR 44 (PC)).

[27] However having said the foregoing it should also be noted that it is incumbent upon this court to prevent miscarriage of justice at all times. One way is to ensure that the lower courts apply correctly the principles of law on the facts as found. Indeed an appellate court should intervene where the finding is unreasonable in the sense that, having regard to the evidence, no other reasonable fact-finder would have arrived at such finding. In other words the finding must be rational. 'The general principle would appear to be that it will usually be proper to treat a decision maker's tasks of fact finding and the drawing of factual inferences from established facts as falling within the decision maker's jurisdiction, unless the decision maker has reached absurd results or reached results absurdly' (see *Malayan Banking Bhd v Association of Bank Officers Peninsula Malaysia* [1988] 3 MLJ 204; *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy and Ors* [1946] AC 508).

[28] Meanwhile we are well-appraised that the learned trial judge came to his decision based on the totality of the evidence adduced before him. Plainly in coming to his decision the learned trial judge adopted the 'story model of decision making' approach which involved the organising, interpreting and evaluating the evidence against a narrative construction of the events supplied by the parties before him and from his knowledge and experience. However, it was the admission of some of the evidence that has now become the focus in these appeals.

THE ADMISSION OF THE DISCOVERY STATEMENTS — S 27 OF THE EVIDENCE ACT 1950

[29] Learned counsel for the appellants submitted that the learned trial judge and the Court of Appeal erred in admitting the discovery statements purportedly given by the appellants to the police while being interrogated. It was argued that since the learned trial judge rejected the admission of the cautioned statements recorded from the appellants during the same period it should only be logical that the discovery statements should have been excluded as well. It was also contended that there was oppression exerted upon the appellants at the material time.

[30] Foremost we would address the issue of oppression. We find that the learned trial judge negated such allegation. He did not consider any oppression exerted on the appellants since each of them was only interrogated on one occasion. Having therefore carefully considered his reasons we are of the view, as was the Court of Appeal that on the facts and evidence before the learned trial judge such conclusion could not be said to be unreasonable.

[31] It should be borne in mind that the hurdles to overcome for the admission of cautioned statement and for discovery statement are quite distinct. The former demands voluntariness at the time of making it and that there should be absence of any form of oppression, inducement, threat or promise to the maker. The latter does not require those prerequisites save that the court has the discretion to exclude it on the ground that its prejudicial effect outweighed its probative value (see *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507; [1999] 1 CLJ 829; *Kesavan v Public Prosecutor* [2003] 2 MLJ 209; [2003] 1 CLJ 846).

[32] In respect of the first appellant we are, as the Court of Appeal was, in complete agreement with the conclusions reached by the learned trial judge in respect of the points related to this issue raised before him. In exercising his discretion to admit the discovery statement the learned trial judge was of the view that the probative value of the discovery statement far outweighed its prejudicial effect.

[33] It was also submitted that the accuracy of the discovery statement should be doubted in view of the evidence given by the first appellant during the trial within trial where he said that there was already police personnel at the place where the body of victim 4 was found.

[34] With respect we do not think there is any merit in the argument. In the first place the learned trial judge came to his conclusion after considering all the testimonies adduced before him. He preferred the version given by the police officers to that of the first appellant. He made a finding of fact on the reliability and accuracy of the evidence adduced affirming that the first appellant did make the discovery statement. We find no compelling reason to reverse such finding. Proper appreciation of the evidence adduced was done and the right principles of law considered and applied.

[35] Further, in the case of *Public Prosecutor v Kalaiselvan* [2001] 2 MLJ 157 Augustine Paul J (as he then was) said this:

> It is settled law that evidence adduced in a trial within a trial cannot be used against the accused in the main trial. Thus as Meares J said in *Ex parte Whitelock; Re Mackenzie* [1971] 2 NSWLR 534 the voir dire is entirely separate from the trial proper. Wells J in *R v Williams* [1976] 14 SASR, made the observation that the voir

dire ...' stands apart from the usual and regular conduct of a criminal trial ... (at p 2). In *R v Bradshaw* [1978] 18 SASR 83, King J expressed the view that the voir dire hearing is not part of the trial proper. In *R v Bannerman* (1966) 48 CR 110, Miller CJM accepted that the voir dire must be kept separate from the trial itself. In *Chua Poh Kiat Anthony v Public Prosecutor* [1998] 2 SLR 713 and *Lim Seng Chuan v Public Prosecutor* [1977] 1 MLJ 171, it was held that the fundamental principle of the administration of justice is that a voir dire ought to be considered a separate or collateral proceeding.

[36] We find that the foregoing view represents the correct exposition of the law relating to the evidence recorded during a trial within trial. No doubt in this case the purported evidence being relied upon is in favour of the first appellant. Nevertheless the same principle should apply irrespective of the tilt of the evidence in issue.

[37] It is trite law that the sole purpose of a trial within a trial is to determine admissibility of confession or cautioned statement. Once the court has determined one way or the other on the admissibility of confession or cautioned statement the evidence recorded during such trial within trial would have served its purpose. It should not be considered again as part and parcel of the main body of evidence adduced at the main trial. Otherwise it would be unfair and could cause undue prejudices to both the prosecution and the defence. After all there is nothing to preclude a party from adducing the same evidence when the main trial resumes.

[38] Hence, we find no merit in the contention that the learned trial judge should have given his reasons for refusing to admit the cautioned statement of the first appellant. We would say that there was sufficient reason given when the learned trial judge found that the requirement of voluntariness under s 113 of the Criminal Procedure Code was not satisfied and that its relevancy 'is now purely academic being not a part of the case for the prosecution'.

[39] Accordingly since the learned trial judge declined to admit the cautioned statement of the first appellant he could not be expected to revisit any of the evidence adduced during the trial within trial irrespective of which side it favoured when considering the case as a whole. To do so would tantamount to requiring him to consider such evidence favourable to the first appellant. That would not be a fair trial.

[40] Thus, having carefully read the judgments of the lower courts in relation to the admission of the discovery statement by the first appellant we

did not find any obvious error committed in accepting the version that there was no police personnel at the place where the body of victim 4 was found. It is a finding of fact.

[41] Accordingly, we find no merit in the submission that the learned trial judge should not have admitted the discovery statement of the first appellant. We would further add that we are in entire agreement with the Court of Appeal for upholding the conclusion arrived at by the learned trial judge on the issue.

[42] For the second appellant it was submitted that the reasons for excluding the discovery statement were more compelling.

[43] The reasons:

(a) the discovery statement was given a day and half *after* the cautioned statement of the second appellant was recorded;

(b) the discovery statement of the other co-accused cannot be used against another accused;

(c) the accuracy of the statement was critical and should have been given due consideration; and

(d) the discovery statement was the main evidence in finding the second appellant guilty since there was no identification conducted before he was charged.

(Emphasis added.)

[44] As we have said above the admission or rejection of discovery statement is not premised on voluntariness. It is an exercise of discretion by a trial judge based on established legal principles as discussed above. Hence, in this case the fact that the discovery statement was made a day and the half after the cautioned statement was recorded should not preclude the learned trial judge from exercising his discretion. 'There is a presumption that the judge has rightly exercised his discretion' (see *Charles Osenton & Co v Johnston* [1942] AC 130). Having considered the submissions of learned counsel for the second appellant we are not persuaded that the learned trial judge had erred in the exercise of his discretion.

[45] Thus, having considered the reasons given by the learned trial judge for admitting the discovery statement of the second appellant we find no basis to say that he committed an error in doing so. On this issue our reasons given

in relation to the discovery statement of the first appellant are relevant.

ABSENCE OF IDENTIFICATION

[46] On the issue of absence of identification it should be noted that contrary to the submission of learned counsel the learned trial judge did not rely on the discovery statement alone to find the second appellant guilty. There were other circumstantial evidence (an issue to be dealt with later in this judgment) which were given due judicial appreciation before being relied upon. Further there was no denial by both the appellants that they were in the vicinity of the jewellery shop when their car was seen by PW33. Hence there is no merit in this issue.

PRIMA FACIE, CIRCUMSTANTIAL EVIDENCE, PRESUMPTIONS AND INFERENCES

[47] It was submitted for the appellants that each piece of circumstantial evidence adduced by the prosecution did not indicate their guilt for the offences of murder. Thus, the prosecution failed to establish a prima facie case at the end of its case. Learned counsel for the second appellant went on to submit that such evidence could not give rise to the following presumptions namely:

(a) that victims 1 to 3 were murdered for the keys to gain access to the jewellery shop;

(b) that victim 4 was murdered to gain access to the jewellery shop;

(c) that all the accused were involved in the theft; and

(d) that all the three accused had been involved in, directly and indirectly, in the murder of the victims 1 to 4 in the furtherance of the theft.

[48] In particular it was argued that mere possession of the jewellery by the second appellant did not mean that he was also involved in the murder of the victims. Learned counsel went on to say that the presumptions relied on by the learned trial judge had no basis in law.

[49] On these points we have considered carefully the judgments of the learned trial judge as well as that of the Court of Appeal. We could not find any error in their approaches and findings. We agree with what the Court of Appeal said:

> Based on the evidence led by the prosecution the learned judge held that both accused had a case to answer and called upon each of them to enter upon their defence. We are of opinion that he was entirely correct in his decision.

A Having considered the material in the record provided to us, we are satisfied that having regard to all the circumstances of the case, the theft or burglary or robbery — call it what you will — and the murders were an integral part of one and the same transaction. Put differently, this is not a case of a mere recovery of recently stolen property from an accused person.

B There are several other cogent pieces of circumstantial evidence which go to establish beyond a reasonable doubt that the first and second accused participated in the commission of the murders in the context of *s 302* being read with *s 34 of the Penal Code*. They were all considered by the learned judge. Here are some of them.

C First, the nature of the injuries suffered by all four victims points to an intention on the part of the assailants to kill them. Of that there can be no doubt.

Second, Balakrishnan's body though found a considerable distance away from the place where the bodies of Sathian and Juriah were found was bound by a similar rope as the latter. This fact points to a similarity in the modus operandi in the
D commission of the crimes. Whoever tied up Sathian and Juriah must have also tied up Balakrishnan.

Third, the fact that Balakrishnan who ought to have been at the shop was found dead at a place some distance away.

E Fourth, the fact that the first accused knew that Balakrishnan's dead body was at the aforesaid place.

Fifth, the first accused's act of throwing Balakrishnan's body at the place where it was found.

F Sixth, the fact that the second and third accused were involved in the hiring of motorcar PCV 7749.

Seventh, this car was outside the shop at about 1am on 13 March 1998.

Eighth, there were no signs of forced entry into the shop. The grilled door was closed but not locked. Three padlocks were found in the shop with the keys in
G them. Virama had taken the keys away with her and these were never found at her home. It follows, as a matter of deductive reasoning that the person or persons who entered the shop and removed the jewellery was also at the scene of the murders of Virama, Sathian and Juriah.

H Ninth, the second accused led PW14 and other police personnel to a place with which he was probably familiar as a former member of the Field Force and at which place he had hidden the jewellery stolen from the shop.

Tenth, the first accused was found in a room rented by the second accused. This fact fairly supports an inference of complicity between the first and second accused.

I

[50] Although there was a reference by the learned trial judge to s 114 of the Evidence Act 1950 he was in fact relating to factual inferences based on the given circumstantial evidence adduced. In our opinion he was perfectly entitled to do so. It is not a case of where the learned trial judge cast upon

the appellants, in particular the second appellant, the burden of proof so that they have to establish probability in their favour. Neither is it a case of being merely in possession of the jewellery which made the second appellant guilty for the murders. This is a case of where the theft and murder are taken as one transaction. As such it is the cumulative effects of each of the circumstantial evidence adduced that were considered. We do not find any error in such approach. After all finding facts by way of inferences from sets of primary proved facts is a common task for a trial court. It is trite law that an appellate court will not disturb finding of facts of a trial court based on inferences from primary facts if such inferences, having regards to the evidence and circumstances, are reasonable.

[51] The Court of Appeal took the same course albeit no reference to the said section. 'One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed' (see *Jones v Dunkel* (1958–59) 101 CLR 298).

[52] Learned counsel for the second appellant argued that the theft and murders should not be taken as one transaction. Gleaned from that perspective learned counsel contended that the defence of the second appellant should not even have been called. Such argument is only plausible if the version of the second appellant on the event is believed. However the learned trial judge who had the advantage of listening and seeing him in the witness box disbelieved it. He gave reasons for his findings which we do not find unreasonable or irrational. Thus, being an appellate court we should therefore be slow in disturbing such finding of facts (see *Nathan v Public Prosecutor* [1972] 2 MLJ 101).

[53] There are several instructive judicial decisions on how circumstantial evidence should be dealt with in appropriate cases. The main principle distilled from those decisions is summarised thus:

> That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner? (see per Thomson CJ in *Chan Chwee Kong v Public Prosecutor* [1962] MLJ 307).

SILENCE OF THE FIRST APPELLANT

[54] When his defence was called the first appellant opted to remain silent.

In law he was entitled to take that option. Notwithstanding, his learned counsel in submission argued that his silence was quite irrelevant since the evidence adduced by the prosecution in the first place did not prove that the first appellant was involved in the murders.

[55] As said earlier we find no error when the learned trial judge called for the defence of the appellants. We agree that there are more than sufficient circumstantial evidence adduced and reasonable inferences drawn to justify such decision. Thus by opting to remain silent after being called to enter upon his defence the learned trial judge had no option but to convict the first appellant. Such was the opinion of this court in the case of *Public Prosecutor v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 (FC). This is what it said:

> If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to the conclusion that a prima facie case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a prima facie case has been made out, it must call for the defence. If the accused then elects to remain silent, the court must proceed to convict him. It is not open to the court to then re-assess the evidence and to determine whether the prosecution had established its case beyond a reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the prima facie case one that is established beyond a reasonable doubt. Put shortly, what the trial court is obliged to do under ss 173(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 CLJ 10; [1983] CLJ 101 (Rep); [1983] 2 MLJ 232. If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted.

Similar view was also expressed by this court in the case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85.

SECTION 34 OF THE PENAL CODE

[56] It was submitted for the first appellant that the prosecution failed to establish that there was prior meeting amongst the appellants with the common intention to commit and did commit the offence namely to rob and murder.

[57] For the second appellant it was contended that in order for s 34 to apply it was necessary for the prosecution to establish beyond reasonable

doubt that there was common intention to rob and that murder was committed in furtherance of such common intention to rob by the appellants.

[58] It was also submitted that the circumstantial evidence adduced by the prosecution and adopted by the Court of Appeal as one of the ten factors which irresistibly pointed to the guilt of the appellants did not show common intention to rob thereby triggering the application of the legal principles associated with s 34 of the Penal Code.

[59] As regards the ten factors or 'cogent circumstantial evidence' referred to by learned counsel for the second appellant we have already expressed our concurrence with the Court of Appeal. We do not think there is much more can be said about it. Nevertheless since s 34 was raised in the context of those factors we would address it accordingly.

[60] It is settled law that s 34 is a rule of evidence and does not create a substantive offence. Simply put it is a statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly it is just the same as if each of them had done it individually. It is an embodiment of the concept of joint liability in doing the criminal act based on common intention. Hence, an accused person is made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all irrespective of the role he played in the perpetration of the offence. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act.

[61] The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. It has been said that as common intention essentially being a state of mind direct evidence as proof is difficult to procure. Invariably inferences have to be relied upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of injury caused by one or some of them or such other relevant circumstances available. Indeed the totality of the circumstances must be taken into consideration in arriving at a conclusion whether there was common intention to commit the offence for which the accused can be convicted. The facts and circumstances of each case may vary. As such each case has to be decided based on the facts involved. Whether an act is in furtherance of the common intention is an incident of fact and not of law.

[62] For a charge premised on common intention to succeed it is essential for the prosecution to establish by evidence, direct or circumstantial, that there was a plan or meeting of mind of all the accused persons to commit the

offence for which they are charged with the aid of s 34 notwithstanding that it was pre-arranged or on the spur of the moment provided that it must necessarily be before the commission of the offence.

[63] Reverting to the present case the learned trial judge concluded that common intention had been established relying on the inferences garnered from the circumstances proved. He summarised it in this way:

> The following three factors taken together support the conclusion that the first and second accused were acting with common intention in executing the killings.
>
> Firstly, the nature of the injuries on the bodies (the multiple stab wounds) leaves no doubt that the intention of the perpetrators was to commit murder. Given the fact that there were four killings each with multiple stab wounds, and that three bodies were found in the house at different locations, is highly indicative that the killings were the result of the intentional act of more than one person.
>
> Secondly, the fact that the second accused (together with another person not identified) had rented the hotel room where the first accused was staying during the currency of the incident is highly indicative that they were confederates.
>
> Thirdly, given the fact that any one of the accused can be inculpated alone on his own account, to the killings in the four charges, and given that one had led to the discovery of the body of the watchman and the other to the discovery of the jewellery, and also given that it was clear that their common intention was to rob the shop of the jewellery, I am satisfied that they were in fact acting in concert in executing the killings.

[64] The Court of Appeal affirmed the finding of the learned trial judge and went on to say that there were several 'cogent pieces of circumstantial evidence which go to establish beyond a reasonable doubt' that the first and second appellants 'participated in the commission of the murders in the context of s 302 being read with s 34 of the Penal Code'. Some of the circumstantial evidence were listed by the court and we have already reproduced them hereinabove.

[65] Bearing in mind that the acts committed in this case should be taken as one transaction and not separate as learned counsel for the appellants wanted us to do, we are of the view that this is a classic case of where the learned trial judge had carefully and meticulously examined each and every piece of circumstantial evidence adduced before him, drawing the appropriate inferences and findings of facts and applying the legal principles associated with s 34 of the Penal Code before concluding that the first and second appellants had acted with common intention in executing the killings.

[66] In the same way as the Court of Appeal found no error in the conclusion of the learned trial judge we too find it free of any error which warrants our intervention.

[67] Accordingly we find no merit in the submissions of learned counsel for the appellants that the elements of s 34 of the Penal Code have not been established by the prosecution.

CONCLUSION

[68] We have also considered the other points highlighted in the course of argument by all the parties before us. We do not find any of them crucial thereby requiring greater deliberation. Sufficed it to say that they do not persuade us that we should depart from our final conclusion in dismissing these appeals and affirming the decisions of the learned trial judge both in convictions and sentences as affirmed by the Court of Appeal earlier on.

[69] These appeals are therefore dismissed and the convictions and sentences affirmed.

Appeals dismissed. Convictions and sentences affirmed.

Reported by K Nesan